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JUL 1 8 2008

OFFICE OF PETITIONS

In re Application of	:	
Mittelstein et al.	:	DECISION REFUSING STATUS
Application No. 10/673,296	:	UNDER 37 CFR 1.47(a)
Filed: September 29, 2003	:	
Attorney Docket No. P03115	:	

This is in response to the petition under 37 CFR 1.47(a), filed March 24, 2004.

The petition is **dismissed**.

Rule 47 applicant is given TWO MONTHS from the mailing date of this decision to reply, correcting the below-noted deficiencies. Any reply should be entitled "Request for Reconsideration of Petition Under 37 CFR 1.47(a)," and should only address the deficiencies noted below, except that the reply may include an oath or declaration executed by the non-signing inventor. **FAILURE TO RESPOND WILL RESULT IN ABANDONMENT OF THE APPLICATION.** Any extensions of time will be governed by 37 CFR 1.136(a).

A grantable petition under 37 CFR 1.47(a) requires: (1) proof that the non-signing inventor cannot be reached or refuses to sign the oath or declaration after having been presented with the application papers (specification, claims and drawings); (2) an acceptable oath or declaration in compliance with 35 U.S.C. §§ 115 and 116; (3) the petition fee; and (4) a statement of the last known address of the non-signing inventor. Applicant lacks item (1) set forth above.

The applicable statute (35 U.S.C. § 116) requires that a "diligent effort" have been expended in attempting to find or reach the non-signing inventor. *See* MPEP 409.03(a). The showing currently fails to demonstrate, with a documented showing, that a diligent effort was made to find or locate non-signing inventor Robert Schauer, such that the declaration can be accepted under 37 CFR 1.47(a). Where inability to find or locate a named inventor(s) is alleged, a statement of facts should be submitted that fully describes the exact facts which are relied on to establish that a *diligent effort* was made to locate the inventor.

In order to show that a diligent effort was made to find or locate Robert Schauer, petitioner should, at the very least, conduct a search of the regional or national registry(s). The results of such search should be made in any future petition for reconsideration. *See* MPEP 409.03(d).

Additionally, petitioner should state whether he has access to inventor Schauer's personnel records and, if so, what does inspection of the records reveal as to a current address, forwarding address, or an address of the nearest living relative? What does inspection of the phone directories for those address locations reveal?

Further, the petition fails to indicate that a complete copy of the application papers (specification, claims, drawings and oath or declaration) was ever mailed unsuccessfully to the inventor's last known address. From the evidence of record, it only appears that the inventor Schauer was mailed a copy of the documents that required his signature. If he was not presented with a copy of the application papers for this application, then he could not attest that he has "reviewed and understand the application papers" and could not execute the declaration he was requested to sign. Did he receive a copy of the application papers? The fact that an application may contain proprietary information does not relieve the rule 47 applicant of the responsibility to present the application papers to the joint inventors if the inventors are willing to receive the papers in order to sign the oath or declaration. Therefore, at the very least, petitioner should mail correspondence to the inventor's last known address, return receipt and/or forwarding address requested. If a forwarding address is provided, petitioner should then mail a complete copy of the application papers (specification, claims, drawings, oath, etc.) to Mr. Schauer's address, return receipt requested, along with a cover letter of instructions which includes a deadline or a statement that no response will constitute a refusal. This sort of ultimatum lends support to a finding of refusal by conduct.

If the papers are returned and all other attempts to locate or reach the inventor, e.g., through personnel records, co-workers, E-mail, the Internet or the telephone, etc., continue to fail, then applicant will have established that the inventor cannot be reached after diligent effort or has refused to join in the application. **The statements of facts must be signed, where at all possible, by a person having firsthand knowledge of the facts recited therein and should be accompanied by documentary evidence in support of the statement of facts.** It is important that the forthcoming communication contain statements of fact as opposed to conclusions.

Also, the record is not clear as to whether inventor Schauer cannot be found or if he refuses to sign. Where there is an express or oral refusal, that fact, along with the time and place of the refusal, must be stated in an affidavit or declaration by the party to whom the refusal was made. Where there is a written refusal, a copy of the document(s) evidencing that refusal must be made part of the affidavit or declaration.

When it is concluded by the rule 47 applicant that an omitted inventor's conduct constitutes a refusal, all facts upon which that conclusion is based should be stated in an affidavit or declaration. If there is documentary evidence to support facts alleged in the affidavit or declaration, such evidence must be submitted.

Whenever an omitted inventor gives a reason for refusing to sign the application oath or declaration, that reason should be stated in the affidavit or declaration.

In addition, the required petition fee of \$130.00 was charged to Deposit Account No. 02-1425 as authorized in the Response to Notice to File Missing Parts, which was filed with this petition on March 24, 2004.

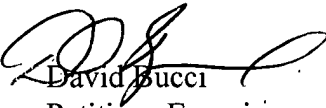
Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITIONS
 Commissioner for Patents
 Post Office Box 1450
 Alexandria, VA 22313-1450

By hand: Customer Service Window
 Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

By fax: (571) 273-8300
 ATTN: Office of Petitions

Telephone inquiries should be directed to Christopher Bottorff at (571) 272-6692.


David Bucci
Petitions Examiner
Office of Petitions



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of: M. Mittelstein, et al.

Examiner: To be Assigned

Serial No.: 10/673,296

Atty. Docket No.: P03115

Filed: September 29, 2003

Art Unit: 3763

**For: A PERISTALTIC PUMP WITH A
MOVEABLE PUMP HEAD**

**STATEMENT OF FACTS IN SUPPORT OF FILING ON BEHALF
OF NON-SIGNING INVENTOR UNDER 37 C.F.R. 1.47**

Commissioner of Patents
Alexandria, Virginia 22313

07/18/2008 CKHLOK 00000020 021425 10673296
01 FC:1460 130.00 DA

HONORABLE SIR:

This is in Response to Notice to File Missing Parts mailed January 5, 2004.

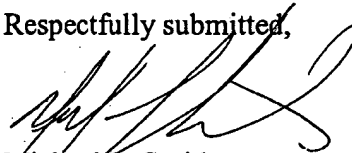
One of the named co-inventors of the present invention, Robert Schauer, at a last known address of 3729 South Alder, Santa Ana, California 92707 has been unresponsive to numerous requests to sign the Declaration and Power of Attorney and Assignment documents for the present invention. The other named inventors have all signed the appropriate documents. On 19 November 2003, Mr. Schauer was first sent via Federal Express documents to sign, then again on 15 January 2004, the inventors were again sent a letter asking them to return the signed documents. The undersigned attempted to call inventor Schauer at his last known phone number of (714) 350-5671, which number had been disconnected.

Finally on 9 February 2004, Mr. Schauer was sent another Federal Express package including all the documents for his signature, and no response has been received from Mr. Schauer.

Therefore from the above stated facts, it is respectfully submitted that it has been established that diligent effort was made to secure the execution of the Declaration by co-inventor Schauer for the above-identified application. Therefore, this Statement of Facts is hereby submitted for filing on behalf of the non-signing inventor Schauer.

This Statement is being made by the undersigned who has first-hand knowledge of the facts recited herein.

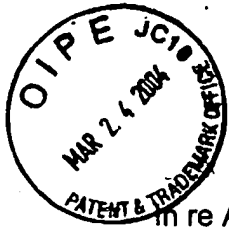
Respectfully submitted,



Michael L. Smith
Reg. No. 35,685

DATE: March 19, 2004

Bausch & Lomb Incorporated
One Bausch & Lomb Place
Rochester, New York 14604-2701
TEL: 636-226-3197



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)	
M. Mittelstein, et al.)	Examiner: To be Assigned
)	
Serial No.: 10/673,296)	Art Unit: 3763
)	
Filed: September 29, 2003)	Docket No.: P03115
)	
Title: PERISTALTIC PUMP WITH A MOVEABLE PUMP)	
HEAD)	

Response to Notice to File Missing Parts mailed January 5, 2004

Mail Stop Missing Parts
Commissioner of Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Honorable Sir:

In response to the Notice to File Missing Parts mailed January 5, 2004, regarding the above-identified application, enclosed find Part 2 of the Formalities Letter, a properly signed Declaration and Power of Attorney in compliance with 37 CFR 1.63, and a Statement of Facts in Support of Filing on Behalf of Non-Signing Inventor under 37 C.F.R. 1.47.

Please charge the non-small entity surcharge set forth in 37 CFR 1.16(e) and any other required fees to Deposit Account No. 02-1425. Triplicate copies of this letter are provided herewith for billing purposes.

Should there be any questions regarding this communication, please contact the undersigned at (636) 226-3197.

Respectfully submitted,

Michael L. Smith
Reg. No. 35,685

DATE: March 19, 2004

Correspondence address:
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